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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 20

SCHAFFER TRANSPORTATION COMPANY, and
AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court For The District of South Dakota, Northern Division.

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AN AMICUS CURIAE

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THE INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

The League is a nationwide organization of shippers via all forms of transportation, including railroads, motor carriers, water carriers, and air carriers. The organization is dedicated to the promotion of sound economic transportation.

Broadly speaking, the League has an interest on behalf of its membership, as representative of the shipping public, in the principles and policies governing the regulation of transportation. It is, therefore, concerned with the inter-

pretation by the Courts and by the Interstate Commerce Commission of the provisions of the National Transportation Policy and the Interstate Commerce Act.

In particular, the League is interested in the granting of operating rights for motor transport sufficient to meet the public need for such transportation. It advocates the full development of a national transportation system by water, highway, and rail, as well as other means, and in the preservation of the inherent advantages of each form of transportation, according to the National Transportation Policy.

It is the position of the League that the public is entitled under the law to adequate service by motor vehicle as well as by rail; and the availability of one mode of service has no bearing upon the public need for the other.

In this case the Commission denied operating rights for motor transportation on the grounds that reasonably adequate rail service exists. This decision of the Commission, sanctioned by the Court below, is contrary to the position of the League and squarely presents the question whether the shippers of the country are entitled to service by all available forms of transport, or whether the Interstate Commerce Commission may determine that only the services of rail transport shall be utilized. Accordingly, the League membership, at its annual meeting in November, 1956, directed counsel to file, with leave of the Court, a brief as *amicus curiae* in support of appellants.

The League has no interest in the operating rights of any particular carrier and takes no position in any case with respect to whether a finding of public convenience and necessity for motor or rail service is supported by the evidence. The sole concern of the League is that the determination of the issue of public convenience and necessity for motor service shall not be dependent on the existence or adequacy as such of rail service.

SUMMARY OF ARGUMENT

(1) The Court below accepted at face value a statement of defendants that the Commission did not deny motor service on the grounds that rail service was in and of itself adequate. But the record discloses that the Commission's action was based on such grounds. This is so because the Commission's ultimate finding was based upon the conclusion that the service presently available is reasonably adequate; and the only service presently available is rail service. The Commission's motor carrier division had already denied motor service in respect of the territory where present motor service was available.

(2) In a determination of the public convenience and necessity for motor service the existence or adequacy of rail service is not a legally relevant consideration. The National Transportation Policy requires the Commission so to administer the licensing provisions of the statute as to preserve the inherent advantages of each mode of transport and to develop and preserve a national transportation system by all modes. Therefore the public is entitled to both motor and rail service wherever a need for service is shown, and the Commission is without power to restrict the licensing of motor service merely because rail service is available and is reasonably adequate. The Commission followed this principle for fifteen years, but erroneously departed from it in the base at bar. The principle is supported by the regulatory scheme as a whole, as is illus-

trated by the provisions of the Rule of Rate Making under which the reasonableness of the rates of one mode of transport may not be judged by the effect which they may have upon the traffic of another mode of transport.

(3) The League has no interest in the licensing of a particular carrier, motor or rail. It is very greatly concerned, however, with the principle involved and prays that the Court will hold as a matter of law that the existence or adequacy of rail service is not a legally relevant consideration in the licensing of motor service.

ARGUMENT

I.

THE EXISTENCE OF "REASONABLY ADEQUATE" RAIL SERVICE WAS ADOPTED BY THE COMMISSION AS GROUNDS FOR DENYING MOTOR SERVICE.

The learned Court below adopted verbatim in its opinion a statement in defendants' brief that "The Commission did not deny the application on the ground that rail service in and of itself was adequate." (R. 367) We think that statement is erroneous and that defendants have confused the record as to what grounds the Commission adopted for its denial of motor service. In any event it is necessary to settle the point in order to know what question is presented. As this Court has said in reviewing orders of the Interstate Commerce Commission, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M. St. P. & P. RR.*, 294 U.S. 499, 511 (1935).

As a matter of course, the ultimate finding of the Commission was that "applicant has failed to establish that the present or future public convenience and necessity require the proposed operation," (R. 37).

However, the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). In this case it is clear that the basis for the Commission's ultimate finding was the conclusion "that the service presently available is reasonably adequate." (R. 37). The context shows that when the Commission spoke of "presently available service", it was referring to rail service alone. For the Court below noted that the Commission's expe-

rienced trial examiner had recommended granting the proposed authority, and its motor carrier division had ordered the granting of the authority by a vote of two to one only after carving out of the territory sought to be served all that was shown to have adequate *motor* service. (R. 366) Therefore, when the case came before the entire Commission, the question was whether existing rail service constituted adequate grounds for denying the application in its entirety. It would not be reasonable to assume, and there is nothing in the record to indicate, that the entire Commission split six to four on the general proposition as to the degree of proof necessary to warrant a finding of public convenience and necessity for motor service. After twenty years of administration of the Motor Carrier Act, 1935, the considerations governing such a determination are too well understood for any such widespread disagreement with the Commission. We submit that the Commission did deny the application on the ground that rail service in and of itself was adequate. The Court below erred when it adopted a contrary conclusion and when it said (R. 367):

> It [the Commission] purported to weigh all of the salient factors constituting proof of need for the service and in the light of the entire record found that there wasn't any need for the service which could not be handled adequately by existing carriers, both motor and rail.

The record shows that the Commission had already given full effect to the existing motor carrier service and was dealing finally with shippers who had no motor service (R. 21, 22-3); that left only rail service as grounds for denying any new motor service.

II.

THE COMMISSION'S DECISION IS NOT IN ACCORDANCE WITH LAW.

We agree with defendants and with the Court below that a finding of present or future public convenience and necessity is for the Commission, upon which the courts will not weigh the evidence to reach a contrary finding, and that the statute does not specify the considerations by which the Commission is to be governed in making such finding (R. 363-4). But we submit that the Commission exceeds its power and acts contrary to the provisions of the statute, when it allows its finding as to proposed motor service to be prejudiced or influenced by the existence of rail service.

The Commission's finding was made under 49 U.S.C. 307(a), in the administration of which the Commission is required to carry out the National Transportation Policy. *Luckenbach S. S. Co.* v. *U. S.*, 122 F. Supp. 824, 827 (aff. 347 U.S. 984). The National Transportation Policy provides (49 U.S.C. preceding Sec. 1):

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as

> well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

The League respectfully submits that the congressional policy to develop a transportation system by highway, as well as by rail and water and other means, cannot be given effect if motor service is denied because reasonably adequate rail service exists. The "inherent advantages" of motor service cannot be recognized and preserved if the existence of reasonably adequate rail service may lawfully be taken as grounds for denying such motor service. "Impartial regulation of all modes of transportation" is not possible if motor service is restricted to protect existing rail service.

For fifteen years the Commission's administration of 49 U.S.C. 307(a) recognized the principle for which we contend. In the first volume of its motor carrier reports the Commission rejected the contention of the railroads that a motor carrier application should be denied on the grounds of reasonably adequate existing rail service, saying that shippers "are entitled to adequate service by motor vehicle as well as by rail". *Bowles Common Carrier Application*, 1 M.C.C. 589, 591.

Later, in *Crabb & Jespersen*, 30 M.C.C. 687, the Commission rejected the renewed contention that it should not allow both rail and motor service, but should determine which one should serve the public, saying (p. 689):

> The purpose of the act clearly contemplates the existence of transportation by highway as well as by rail. We have uniformly held, in numerous applications by motor carriers for authority to establish service which would be competitive with rail service, that the shipping public is normally entitled to an adequate

> system of transportation by motor vehicle as well as by rail.

Parenthetically, the Commission has also said, and recently, that it had never held that the mere absence of motor service, without more, would justify a grant of motor carrier authority. (R. 365) The League does not contest that statement; clearly the presence or absence of motor service is a relevant but not exclusive consideration. But that is beside the point here, which is that the existence of rail service is not a relevant consideration in determining the public need for motor service. Clearly, the field of Commission authority lies between the extremes of denying motor service because of existing rail service, and granting motor service because of the absence of motor service. In this case the Commission has departed from its long-standing adherence to the congressional scheme of regulation and has gone beyond permissible limits to deny motor service because rail service is available.

The principle that rail service is not a relevant consideration in determining the need for motor service is sustained by failure of efforts to amend the law so as to make such considerations relevant and requisite. Senate Bill 2753 in the second session of the 82nd Congress would have provided an amendment to 49 U.S.C. 307(a) by which it would have provided:

> In determining whether the proposed service, or any part thereof, is or will be required by the present or future public convenience and necessity the Commission shall give due consideration, among other things, to the transportation service already being provided by an existing carrier or carriers subject to part I, part II or part III and to the effect which the authorization of the proposed service would have on such existing carrier or carriers.

Extensive hearings were held on this bill in 1952, in which the League participated in opposition to the legislation. No action was taken by the Congress on that bill which would have changed the then standing policy of the Commission recognizing the right of the public to both forms of transportation.

The regulatory scheme contains other provisions which are consistent only with the principle that the existence of rail service is irrelevant to a determination of the need for motor service. In the rule of rate making, 49 U.S.C. 15a (2), the Commission is required in the exercise of its power to prescribe just and reasonable rates, to give due consideration, among other factors, "to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed". The Commission has correctly interpreted this section to mean that the effect of rail rates on motor traffic is an irrelevant consideration in determining the reasonableness of the rail rates. *Petroleum Products in California and Oregon*, 284 I.C.C. 287, 305 (1952).

Research discloses no judicial authorities on the question presented. The opinion of the Court below only touches upon the question because the Court did not understand that the Commission's denial was based on the existence of rail service. At that point in its opinion, the Court merely stated (R. 366) that the courts have sustained the Commission's view that the adequacy of existing service is to be determined without regard to whether the existing service is provided by the railroads or other motor carriers, citing *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945).

If the Court meant by that statement that the adequacy of existing service is to be determined without regard to whether the existing service is a motor service or a rail

service, then the statement is in error and is not supported by the *Parker* case. On the other hand, if the Court meant that the adequacy of existing service is to be determined without regard to whether the motor service involved is owned by a railroad or a motor carrier, then the citation of the *Parker* case sustains the statement, but it is not pertinent to the question presented here. That question of whether motor service should be performed by a railroad subsidiary or by a motor carrier is involved in another case now before this Court: *American Trucking Associations* v. *United States*, No. 6, October Term, 1957.

CONCLUSION

The League prays that the court will interpret 49 U.S.C. 307(a) and the National Transportation Policy to hold that the existence of reasonably adequate rail transportation service is not a legally relevant consideration in the determination by the Commission of the public convenience and necessity for motor service. The League further submits that the existence and adequacy of motor service is a relevant but not exclusive consideration in such a determination by the Commission.

Respectfully submitted,

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